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No. 83-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CASPER CITRON, STEVEN CASPER HENRY CITRON, and ALISANDE CITRON SLIVKA,

Petitioners,

—against—

FIONA GRAHAM CITRON, M.D.,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEREMIAH S. GUTMAN
Levy, Gutman, Goldberg, and Kaplan
275 Seventh Avenue
New York, N.Y. 10001
(212) 807-9733

Counsel for Petitioners

Casper Citron, Steven Casper Henry Citron, and Alisande Citron Slivka respectfully petition for a writ of certiorari in this case to review an order of the United States Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

1. In order to recover under the wiretap statute, 18 U.S.C. §§ 2510, ff., the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351 (hereinafter "the Safe Streets Act"), must the plaintiff establish that the defendant not only purposely intercepted but knew at the time that it was criminal to do so?

2. When the jury finds, in re-

sponse to a specific interrogatory addressed to punitive damages, that the defendant did not know she was violating the law or act in reckless disregard of whether or not her admitted wiretap was unlawful, must the plaintiff's cause of action itself be dismissed?

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TABLE OF AUTHORITIES

OPINIONS BELOW

The decision of the United States District Court for the Southern District of New York is reported at 539 F.Supp 621 (S.D.N.Y. 1982). The opinion of the United States Court of Appeals for the Second Circuit is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was issued November 14, 1983. A petition for rehearing containing a suggestion for rehearing en banc was denied by order of the Court of Appeals dated and filed December 29, 1983. Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1).

STATUTES INVOLVED

18 U.S.C. § 2511 provides in relevant part

> (1) Except as otherwise specifically provided in this chapter any person who--
>
> (a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication;
>
> (b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any communication when--
>
> (i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communications . . .
>
> shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2520 provides

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from such person--

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.

STATEMENT OF THE CASE

Petitioners, a father and his two

children, sued the estranged wife and stepmother of Petitioners for willfully intercepting telephone communications in violation of 18 U.S.C. § 2520. It is not denied that Respondent, for the purpose of preparing for contemplated matrimonial litigation with her husband, purchased a device, which she herself installed, for the puropose of surrepetitiously eavesdropping and recording telephone conversations of her husband, Petitioner Casper Citron. Respondent was found by the jury to have intercepted and recorded specified conversations involving each of the Petitioners.

Among the special interrogatories posed to the jury by the trial court was the following, which was specifically limited by the court as addressed to the

issue of punitive damages:

> Do you find that the defendant [Respondent] either knew she was violating the law or acted in reckless disregard of whether or not the conduct was unlawful?

The jury answered that special interrogatory in the negative. The trial court held that it was bound by that determination to dismiss the complaint because of the absence of the willfulness contemplated by 18 U.S.C. §§ 2511(a) and (b), even though the interrogatory had been limited to the issue of punitive damages.

The jurisdiction of the United States District Court was invoked under 28 U.S.C. §1331.

REASONS FOR GRANTING THE WRIT

This case raises before this Court for the first time important issues of statutory construction on which there is a conflict among the circuits.

I. THE DECISION BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT RAISES IGNORANCE OF THE LAW TO THE LEVEL OF BOTH CRIMINAL AND CIVIL EXCULPATION OF RESPONSIBILITY AND LIABILITY.

It is undisputed that 18 U.S.C. § 2520 predicates civil liability upon actions which would constitute criminal violation of 18 U.S.C. § 2511. Petitioners make no argument on that point. The order affirming the dismissal of the complaint upon the ground that Respondent did not know she was commiting a crime, al-

though she knew what she was doing and intended to do so, would establish the proposition that ignorance of the law is an excuse for conduct willfully undertaken in violation of the law. The citation to United States v. Murdock, 290 U.S. 389 (1933), mentioned in the legislative history, does not support that posture. This Court in Murdock said at 394-95, as quoted by the Court of Appeals, that

> The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act.

This Court did not say in Murdock

that the defendant had to know that the intentionally and knowingly undertaken voluntary act was also a violation of a criminal statute. Because the jury found that Respondent did not know she was violating the law and did not act in reckless disregard of whether or not her conduct was unlawful, is not as though it had found she acted without bad purpose, with justifiable excuse, or not stubbornly, obstinately, or perversely. The fact that this Court said that "willful" "is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act" does not mean that all conduct done in ignorance of whether or not the law was violated, or in absence of careless disregard with respect thereto, cannot as a

matter of law be criminal.

By cantilevering from a negative finding with respect to those answers on a punitive damage issue to jettison the entire cause of action is to destroy the viability of the Safe Streets Act as intended by Congress. This question ought to be reviewed by this Court.

II. THE DECISION BELOW CREATES A CONFLICT WITH THE DECISIONS IN OTHER CIRCUITS.

In Campiti v. Walonis, 611 F.2d 387 (1979), the First Circuit held that good faith belief that the wiretapping done by the defendant was an exception to the Safe Streets Act was no defense.

Speaking for a unanimous Court, Circuit Judge Bownes said (at 390) that the defendant there was liable even though the undisputed fact found by the district court was that defendant

> knew of the federal wiretap statute at the time he monitored the call, but thought that it only applied to a foreign device attached to a telephone line. He was unaware of the Massachusetts wiretap statute. The court noted, without making a finding, that Walonis testified that he believed then, and still believes, that monitoring an inmate call on institution equipment in a maximum security prison was perfectly legal. Defendants Gunther and Brown also held the same belief.

The First Circuit thus squarely holds that ignorance of the law is no excuse, that the willfulness required by the statute is satisfied by the deliberate and knowing undertaking of the course of conduct re-

gardless of ignorance of criminality, and even the presence of a good faith belief in lawfulness. As that court stated at 395:

> Appellants' good faith defense argument would mean that a defendant's interpretation of the statute, no matter how distorted, would be a complete defense to liability. The next logical step would be immunity based on the belief that the law was wrong and should not be obeyed.

As the District Court here recognized in "rejecting" that position (539 F. Supp. at 624 fn. 5), the Ninth Circuit in Jacobson v. Rose, 592 F.2d 515 (1978), held exactly contrary to the Second Circuit in the instant case when it specifically determined (at 520) that the rejection of the predicate for punitive damages (phrased by the Court as "wantonness, recklessness, or maliciousness") did not

affect basic liability under 18 U.S.C. § 2520.

III. THE CONSTRUCTION OF THE STATUTE BY THE ORDER SOUGHT TO BE REVIEWED CREATES AN INCONSISTENCY WITHIN THE STATUTE REQUIRING CLARIFICATION BY THIS COURT.

18 U.S.C. § 2520 provides "a good faith reliance on a court order or on the [existence of a State statute] shall constitute a complete defense to any civil or criminal action brought under this chapter." Congress has provided a specific and limited good faith defense. Contrary to the holding of the First Circuit in Campiti v. Walonis, supra, the Second Circuit in the instant case has interpolated into the statute an additional good

faith defense available to any defendant who can convince a jury or a court that the deliberate, intentional, voluntary wire interception, knowingly undertaken, was done in ignorance of the existence of the relevant criminal statute. The Court of Appeals in the order sought to be reviewed here emasculates the Congressional language, deliberately depriving it of content by holding that the quoted sentence is merely "an emphasis of congress's desire to assure that authorized people such as law enforcement officers and others assisting them would not be held liable when they act in good faith." Especially in view of the First and Ninth Circuit holdings cited above, and in light of the judicial reduction of a Congressional intent to a mere "emphasis," this Court ought to review the issue.

CONCLUSION

Because this Court has not yet defined the content of the words "willfully intercepts" as contained in the Safe Streets Act, and because there is disagreement among the Circuits with respect thereto, and because wiretapping is a widespread and pernicious evil sought to be addressed by Congress by such redress as criminal and civil responsibility in the same statute, and because the Second Circuit has here introduced an alarming element of confusion into the content of the good faith defense articulated by Congress, and because the prevalence of wiretapping in matrimonial, commercial, criminal, and other spheres is so widespread that repeated civil and criminal litigation arising therefrom can be anticipated,

and because the state of the law has been thrown into confusion by the order sought to be reviewed, this Court ought to grant the petition for a writ of certiorari and schedule this case for plenary review.

Dated: New York, New York
March 19, 1984

Respectfully submitted,

JEREMIAH S. GUTMAN
Levy, Gutman, Goldberg,
and Kaplan
Attorneys for
Petitioners
275 Seventh Avenue
New York, N. Y. 10001

(212) 807-9733

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 47—August Term, 1983

Argued: September 6, 1983

Decided: November 14, 1983

Docket No. 82-7467

CASPER CITRON, STEVEN CASPER HENRY CITRON, and ALISANDE CITRON SLIVKA,

Plaintiffs-Appellants,

—against—

FIONA GRAHAM CITRON, M.D.,

Defendant-Appellee.

Before:

MANSFIELD, PRATT, *Circuit Judges*, and TENNEY, *District Judge**.

* Of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court, Southern District of New York, Whitman Knapp, *Judge*, dismissing the complaint after a jury trial.

Affirmed.

JEREMIAH S. GUTMAN, New York, New York (Levy, Gutman, Goldberg & Kaplan, of Counsel), *for Plaintiffs-Appellants*.

STANLEY S. ZINNER, White Plains, New York (Greene & Zinner, of Counsel), *for Defendant-Appellee*.

PER CURIAM:

Plaintiffs, Casper Citron and his two adult children, Steven and Alisande, appeal from a judgment of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, dismissing their complaint which claimed that Casper Citron's wife, Fiona Citron, violated the federal wiretapping statute, 18 U.S.C. § 2510 *et seq*.

Plaintiffs' appeal focuses primarily on the word "willfully" in the statute. They contend that when the statute is applied to fix civil liability for unlawful wiretapping, "willfully" should be given a different meaning than when the statute is applied criminally. In a careful opinion reported as *Citron v. Citron*, 539 F. Supp. 621 (S.D.N.Y. 1982), Judge Knapp held that the term "willfully" in the statute has the same meaning whether the statute is

applied criminally or civilly. We agree and therefore affirm. We write only to clarify the meaning of "willfully" in § 2511 when the statute is invoked to impose civil liability under § 2520.

Casper Citron is a radio and television personality with extensive public speaking experience. Fiona Citron, his wife, is a psychiatrist who lacks such experience. Because Fiona felt that she would be no match for her husband as a witness in the state divorce proceeding that she planned to file, she obtained an electronic device to intercept and record her husband's telephone conversations. She also hoped to record information to help her obtain custody of their adopted children.

After recording a few calls, Fiona became apprehensive about the legality of her conduct. She consulted her attorney who told her not to worry. Fiona then continued recording the calls until Casper eventually discovered her activity and brought this civil action seeking damages under § 2520 for unlawful wiretapping. The case eventually was tried before Judge Knapp and a jury.

At the close of the entire case Fiona moved to dismiss on the ground, *inter alia*, that Casper had failed to introduce any evidence showing that Fiona had acted "willfully" within the meaning of § 2511. Judge Knapp denied the motion and submitted the case to the jury on special verdicts. *Citron*, 539 F. Supp. at 623.

Responding to questions in the form of special verdicts, the jury found that Fiona had intercepted and recorded Casper's calls on sixteen different days, Steven's on seven, and Alisande's on three, but that none of the plaintiffs had suffered any actual damages. In answer to a question on the issue of punitive damages the jury found that Fiona neither knew she was violating the law nor

acted in reckless disregard of whether or not her conduct was unlawful.

Fiona then renewed her motion to dismiss, urging that the special verdict on punitive damages conclusively established that she had not acted "willfully" and, therefore, that she had not violated § 2511. The district court initially denied the motion, but upon reconsideration found Fiona's argument persuasive and dismissed the complaint. *Citron*, 539 F. Supp. at 624. Plaintiffs appeal, contending that in a civil action under the wiretapping statute less need be shown to establish willfulness than in a criminal prosecution. We disagree.

Section 2511 of Title 18 provides:

> [A]ny person who —
>
> (a) *willfully* intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication * * * [shall be guilty of a crime]. (emphasis added).

Section 2520 provides:

> Any person whose wire or oral communication is intercepted, disclosed, or used *in violation of this chapter* (1) shall have a civil cause of action * * * [for damages] (emphasis added).

To be civilly liable under § 2520, therefore, a defendant must have violated § 2511. This means that the defendant is not civilly liable for recording her husband's and children's calls unless she acted "willfully". The word "willfully" generally denotes either an intentional violation or a reckless disregard of a known legal duty. In *United States v. Murdock*, 290 U.S. 389, 394-95 (1933), the Court stated:

> The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But, when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act. (citations omitted).

See also United States v. Pomponio, 429 U.S. 10, 12 (1976); *Goodman v. Heublein, Inc.*, 645 F.2d 127, 131 (2d Cir. 1981). Courts do recognize, of course, that the word willfully may be afforded a different meaning if required by a particular statutory scheme in which it appears. *See, e.g., United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976) (lesser showing may be required for purposes of § 32(a) of the Securities Exchange Act). But no special context is presented by the wiretapping statute. The citation to *Murdock* in the Senate Report accompanying Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the wiretapping statutes), makes it clear that congress employed the term "willfully" to denote at least a voluntary, intentional violation of, and perhaps also a reckless disregard of, a known legal duty, *see* S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1963 U.S. Code Cong. & Ad. News 2112, 2181; but, as applied to Fiona's conduct, both of these standards were excluded by the jury's special verdict.

Further, the author of the model wiretapping statute, upon which Title III was based, also cited *United States v. Murdock* for the definition of "willfully", and observed that "[t]his [definition] seems only just in light of

the technical character of the Act." *See* Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 Notre Dame Law. 657, 666 n.19 (1968). Nothing in the statute or in its legislative history suggests that congress intended different standards of willfulness to be applied in the civil and criminal contexts. Nor does it seem logical that the same term, "willfully", in the same statute, § 2511, should have any different meaning when applied directly to a criminal violation than when the same violation is incorporated by reference to establish civil liability.

Finally, we recognize that our broad definition of "willfully" covers much, if not all, of the same territory as the good faith defense referred to by congress in the last sentence of § 2520 which provides:

> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

However, we view that sentence not as an intention to depart from the traditional meaning of "willfully", but as an emphasis of congress's desire to assure that authorized people such as law enforcement officers and others assisting them would not be held liable when they act in good faith."

Accordingly, Judge Knapp correctly held that "liability under Title III—be it civil or criminal—cannot be established against any defendant without showing that he acted with intentional or reckless disregard of his legal obligations." *Citron*, 539 F. Supp. at 626. Since the jury by its special verdict on punitive damages found, in effect, that Fiona's violation of the statute was not

willful, it follows that plaintiffs failed to establish a violation of § 2511 upon which civil liability under § 2520 could have been based, and that Judge Knapp properly dismissed the complaint.

Affirmed.

Casper CITRON, Steven Casper Henry Citron and Alisande Citron, Plaintiffs,

v.

Fiona Graham CITRON, M.D., Defendant.

No. 81 Civ. 5212 (WK).

United States District Court
Southern District of New York.

May 25, 1982.
As Amended June 1, 1982.

MEMORANDUM AND ORDER

WHITMAN KNAPP, District Judge.

This is an action for unlawful interception of telephone communications in violation of Title III of the Omnibus Crime Control and Safe Strets Act of 1968, 18 U.S.C. §§ 2510-20 (the "Act"). Following trial on the merits, the

defendant moved to dismiss the complaint. We now grant that motion.

The Statute

The relevant statutory provisions are found in Sections 2511 and 2520 of the Act. Insofar as here applicable, Section 2511 makes guilty of a felony (except as otherwise specifically provided) any person who:

> "willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . . (Emphasis supplied.)

The Section also provides that violators shall be fined not more than $10,000 or imprisoned for not more than five years,

or both.

Section 2520 provides for the imposition of several forms of civil sanctions on those who violate the statute:[1/] compensation for actual damages suffered by any victim of a violation, or -- if higher-- "liquidated" damages of $100 a day, but not less that $1,000; punitive damages; and counsel fees. Thus the Section states in pertinent part:

> "Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person--
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 for each day of violation or

$1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred."

(Emphasis supplied.)

Section 2520 also contains a "good faith" defense, which provides:

> "A good faith reliance on a on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or any other law. (Emphasis supplied.)

The Instant Litigation

Background

Plaintiff Casper Citron (the "husband") and defendant Fiona Graham (the

"wife") were married in 1970. Their marriage has been stormy, featured by bitter disputes about the care and custody of their adopted children. The wife ultimately filed a complaint for divorce in New York County Supreme Court, to which complaint the husband promptly filed a counter-claim. The marital action is now pending in that court.

The husband is a television and radio commentator accustomed to public appearances and public speaking. The wife is a psychiatrist with no such experience. She testified that she was apprehensive she would be no match for her husband in court, and that she therefore feared losing the children. To redress this perceived imbalance, she intercepted various of the husband's telephone conversations,

hoping to obtain self-revealing information with which to confront him in the marital action.

The means she adopted was to place a recording device on a telephone line which had an extension in the parties' marital bedroom and another in the husband's business office. The device made recordings on a removable "cassette" and was automatic; that is to say, as soon as the receiver was taken off the hook on either of the telephone extensions, the device would start recording, and would continue to do so until the receiver was replaced. Each cassette had a playing time of 180 minutes (90 minutes on each side) so, once connected to the telephone line, it would automatically record a total of 90 minutes of conversation without

human intervention.

The device recorded several conversations by the husband which appear relevant to the pending marital litigation. However, numerous other conversations (both business and social) between the husband and various persons, including two of his children by a former marriage, plaintiffs Steven and Alisande, were also recorded.

At trial, the defendant wife testified she acquired the interception device through a mail order house by responding to an advertisement in the New York Times. She said that the first interception turned out to be a social conversation between the husband and a woman, making her apprehensive about the proprie-

ty of her conduct. She therefore sought legal advice. The lawyer she consulted assured her that she need not worry,[2/] and she continued with the interceptions.

When the instant complaint was filed, the defendant wife moved to dismiss on the authority of Anonymous v. Anonymous (2d Cir. 1977) 558 F.2d 677. We denied that motion noting that--unlike the situation in Anonymous--the interceptions here involved were alleged to have been automatic and continuous throughout a several month period, and were concededly not confined to conversations between the husband and persons directly related to the pending marital action..

At the close of plaintiffs' evidence and again at the close of the whole

case, the defendant wife renewed her motion based on Anonymous, and added the ground that there was no evidence to show that her conduct had been "willful" wthin the meaning of the statute. These motions were denied and the case submitted to the jury on special interrogatories.

The jury was asked to state on how many different days the defendant wife had intercepted conversations of each plaintiff, and what if any actual damages the respective plaintiffs had suffered. They found that interceptions had occurred on sixteen different days, and that conversations of plaintiff husband had been involved on each of those days. They found conversations of plaintiff's son Steven to have been intercepted on seven days; and of his daughter Alisande, on

three. They further found that no plaintiff had suffered any damage as a result of such interceptions. On our then understanding of the statute, these responses would have entitled plaintiffs to recover "liquidated" damages totaling $3,600--$1,600 for plaintiff husband ($100 for each day of interception), and $1,000 each for plaintiffs Steven and Alisande.

With respect to punitive damages, the jury was directed to assess such damages only if they answered the following question in the affirmative:

> "Do you find that the defendant either knew she was violating the law or acted in reckless disregard of whether or not her conduct was unlawful?"

They answered this question in the negative. Accordingly, no punitive damages

were specified.

Upon return of the verdict, the defendant renewed her previous motions, and moved to dismiss on the further ground that, since the verdict established that she had acted neither with intent to violate the law nor in reckless disregard of her legal obligations, her conduct could not be deemed "willful" and she could not be found to have violated the statute. We denied these motions, and directed plaintiffs' attorney to prepare an application for counsel fees.

We have since reconsidered our ruling as to defendant's final motion,[3/] and have come to the conclusion that her position is sound.

Discussion

In drafting Title III of the Omnibus Safe Streets and Crime Control Act, the Congress was primarily concerned with regulating the electronic surveillance activities of law enforcement officials. See S.Rep. No.1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.Code Cong. & Ad.News 2112, 2153-56; Briggs v. American Air Filter Co., Inc. (5th Cir. 1980) 630 F.2d 414, 418; Anonymous v. Anonymous, supra, 558 F.2d at 677.[4/] But see United States v. Jones (6th Cir. 1976) 542 F.2d 661, 669. The Act nevertheless contemplates imposition of serious penalties against any person found "willfully" to have engaged in conduct violating its provisions--law enforcement personnel and

private citizen alike. On the criminal side, violators face imprisonment of up to 5 years and a maximum fine of $10,000 or both; and on the civil side--apart from compensatory damages and attorney's fees--both traditional punitive damages, and the possibility of "liquidated" damages with no apparent relationship to actual harm suffered. Moreover the statute makes no distinction in the quantum of evidence necessary for invocation of those sanctions. Once willfulness is shown everything else follows, no further guidance being provided as to the state of mind appropriate to support imposition of its various criminal and civil sanctions. 5/

In such circumstances, the word "willfully" is usually read to connote

intentional violation or reckless disregard of the law. See, e.g., United States v. Murdock (1933) 290 U.S. 389, 394-96, 54 S.Ct. 223, 225-25, 78 L.Ed. 381; Goodman v. Heublein, Inc. (2d Cir. 1981) 645 F.2d 127, 131.

In Murdock, for example, the Supreme Court observed (290 U.S. at 394-95, 54 S.Ct. at 225):

> "The word [willful] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act." (Citations omitted.)

The Court later made clear that the bad purpose to which it there referred is simply the "voluntary, intentional violation of a known legal duty." United States v. Pomponio (1976) 429 U.S. 10, 12, 97 S.Ct. 22, 23, 50 L.Ed. 12. Accord, United States v. Bishop (1973) 412 U.S. 346, 360, 93 S.Ct. 2008, 2017, 36 L.Ed. 941.

Similarly in Goodman, the Second Circuit referred with approval to a jury charge that a finding of willfulness would have to be based on a showing that the defendant either knew its conduct to be prohibited by the statute there in question (the Age Discrimination in Employment Act), or showed reckless disregard as to whether it was or was not. 645 F.2d at 131. That Court has adopted comparable formulations in a wide variety of sett-

ings. See, e.g., United States v. Schiff (2d Cir. 1979) 612 F.2d 73, 78 n.6 (income tax); United States v. Winston (2d Cir. 1977) 558 F.2d 105, 107- 08 (Railway Labor Act); United States v. Tolkow (2d Cir. 1976) 532 F.2d 853, 858 (Welfare and Pension Plans Disclosure Act); United States v. Otley (2d Cir. 1975) 509 F.2d 667, 672 (Landrum-Griffin Act). See also United States v. Lizarraga-Lizarraga (9th Cir. 1976) 541 F.2d 826, 828; Beard v. Akzona (E.D.Tenn. 1981) 517 F.Supp. 128, 134.

It is this line of authority on which defendant relies in asserting that the jury's verdict, which establishes that she acted neither with intent to violate the law nor in reckless disregard of her legal obligations, exonerates her from liability under Title III. She cites in

support of this argument the legislative history of the Act, which refers with approval to the analysis of willfulness found in the Murdock opinion. S.Rep.No.1097, 90th Cong.,2d Sess., reprinted in 1968 U.S.Code Cong. & Ad.News 2112, 2181.

As indicated above, we are now in accord with the defendant's position. We set forth below both the reasoning which initially led us to reject it, and the considerations which now persuade us that such reasoning was faulty.

Despite the Supreme Court's pronouncement in Murdock, courts have recognized that even in a criminal context, the word "willfully" must sometimes be given a

more restricted meaning if logically required by the general statutory scheme in which it appears. See, e.g., United States v. Dixon ((2d Cir. 1976) 536 F.2d 1388, 1397; United States v. Schwartz (2d Cir. 1976) 464 F.2d 499, cert. denied 409 U.S. 1009, 93 S.Ct. 443, 34 L.Ed. 302.[6/] We intially believed that the affirmative defense found in Section 2520 of the Act would necessitate some such adjustment in the meaning of "willfully." As above noted, that Section provides in part:

> "A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or any other law."

It seemed to us that such a provision would be superfluous if the word

"willfully" were meant to preclude liability where neither intentional nor reckless disregard of the law had been established. As is immediately apparent, no one relying on a court order or legislative authorization could reasonably be deemed to have acted with intent to violate the law. Further, focussing solely on the defendant before us--a private citizen having no connection or experience with law enforcement--we did not believe that such a person could rationally be found to have been reckless just because an official authorization on which he or she may have relied should for some reason turn out to be invalid. It therefore seemed to us that "willfully" could not be given its usual broad construction and that the defendant could be held liable for the intentional conduct although she had not

been shown to have a specific intent to violate the law.

This reasoning, however, overlooked the obvious. It is on reflection self-evident that the good faith defense simply does not apply to actions (civil or criminal) against persons not engaged in law enforcement. There exists no statutory procedure whereby such persons can secure official authorization of interceptions they wish to make; thus, they will never be in a position to invoke the defense. The defense is instead available only to law enforcement personnel and to others who--like telephone company employees--may be expected to assist in implementing the authorized interceptions expressly contemplated by the Act.

Moreover, the good faith defense is by no means superfluous when applied to law enforcement personnel and those who cooperate with them. In view of their presumed familiarity with the law in this area, they might well be considered reckless should it be shown that they were less than diligent in ascertaining the validity of an authorization which later turned out to have been invalid. The Congress apparently concluded that it was important to the purposes of the Act that those called upon to implement officially sanctioned intertceptions should be protected from liability as long as they relied in good faith on facially valid authorizations. The defense here in question--far from being superfluous-- carries out that legislative judgment.

There is thus no logical barrier to giving the word "willfully" the meaning ordinarily attributed to it in a criminal context. We accordingly hold that liability under Title III--be it civil or criminal--cannot be established against any defendant without showing that he acted with intentional or reckless disregard of his legal obligations.

This holding is consistent with the results achieved in those cases-both civil and criminal--that have dealt with defendants, such as law enforcement officials and telephone company employees, to whom the good faith defense is available. See, e.g., Campiti v. Walonis (1st Cir. 1979) 611 F.2d 387, affirming 453 F.Supp. 819 (D.Mass. 1978); Jacobson v. Rose (9th Cir. 1978) 592 F.2d 515, cert. denied, 442

U.S. 930, 99 S.Ct. 2861, 61 L.Ed. 298; United States v. McIntyre (9th Cir. 1978) 582 F.2d 1211; United States v. Schilleci (5th Cir. 1977) 545 F.2d 519. It is also consistent with the only two cases of which we are aware that have specifically considered the quantum of proof necessary to prevail in a civil action against defendants not engaged in law enforcement. Beard v. Akzona, supra, 517 F.Supp. 128; Kratz v. Kratz, (E.D.Pa. 1979) 477 F.Supp.463 at 483-84. Finally, it honors the congressional intent that the proscriptions contained in the wiretap statute apply to all categories of persons, while making clear that--despite the fears expressed by some judges (See, e.g., Anonymous v. Anonymous, supra; United States v. Jones, supra, 542 F.2d at 673; Simpson v. Simpson (5th Cir. 1974) 490 F.2d 803,

cert. denied, 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed.2d 141)--the statute does not mandate interference in the private affairs of individuals having no reason to suspect they may be violating the law.

The jury verdict having established that the defendant acted neither with intent to violate the law nor in reckless disregard of her legal obligations, she may not be deemed to have violated the proscriptions of Title III. We therefore grant the defendant's final motion to dismiss the complaint.

Let judgment enter accordingly.

SO ORDERED.

1/ The statute provides civil sanctions only for actions taken in violation of its penal provisions. Thus, Chief Judge Lord observed in Kratz v. Kratz, (E.D.Pa. 1979) 477 F.Supp. 463 at 483:

> "[N]o civil cause of action arises under Title III unless the criminal provisions of the statute have been violated." (Emphasis in original.)

See also Anonymous v. Anonymous (2d Cir. 1977) 558 F.2d 677 at 677 (affirming dismissal of a civil action under Title III with the observation that "the facts alleged here do not rise to the level of criminal conduct intended to be covered by the federal wiretap statutes. . . ."") (Emphasis supplied.) Accord, Beard v. Akzona (E.D.Tenn. 1981) 517 F.Supp. 128, 133.

2/ Compare Simpson v. Simpson (5th Cir. 1974) 490 F.2d 803, cert. denied, 419 U.S. 897, 95 S.Ct. 176, 42 L.Ed. 141 with Kratz v. Kratz, supra.

3/ Although the Jury's finding that interceptions occurred on only 16 days to some extent undercuts the rationale of our refusal to dismiss on the authority of Anonymous v. Anonymous, we nevertheless adhere to the view that that case does not control where, as here, at least some conversations having no relevance to the marital dispute were intercepted.

4/ As the Briggs Court observed (630 F.2d at 418):

"The act was passed to 'clarify

> the confusion' in the state of the law governing surveillance and wiretaps by law enforcement officials. See [S.Rep.No.1097, 90th Cong., 2d Sess., reprinted in 1968 U.S.Code Cong. & Ad.News 2112] at 2154. The prohibition on private wiretapping and surveillance appears to be an almost incidental extension, added because 'virtually all concede that the use of wiretapping or electronic surveillance techniques by private unauthorized hands has little justification when communications are intercepted without the consent of one of the participants.' Id. at 2156."

5/ We thus reject the rule set forth in Jacobson v. Rose (9th Cir. 1978) 592 F.2d 515, cert. denied, 442 U.S. 390, 99 S.Ct. 2861, 61 L.Ed.2d 298, that an award of punitive damages must be supported by a stronger showing than necessary for compensatory damages. At 520. If, as this Circuit has ruled (see fn. 1., supra), only crimnal conduct is covered by

the statute, it follows that punitive damages must be available once liability has been established. This, of course, is contrary to the views we expressed to counsel during the course of the trial.

6/ Judicial response to Section 32(a) of the Securities and Exchange Act is illustrative. That Section provides for the imposition of various criminal penalties on individuals who willfully engage in certain activity. It goes on to state, however, that no person may be imprisoned for such willful behavior if he acted with "no knowledge" of the rule he is claimed to have broken. 15 U.S.C. § 78ff(a). Such a "no knowledge" defense would be superfluous if the word "willful" as used in Section 32(a) were understood to import intention to violate, or even

reckless disregard of, the law. Courts have accordingly interpreted that word as there employed in a more limited fashion. Thus, in United States v. Dixon (2d Cir. 1976) 536 F.2d 1388, Judge Friendly observed (at 1397):

> "[T]he context of § 32(a) of the Securities and Exchange Act, [including] the clear inference that a person may be convicted (although not imprisoned) for violating a rule of whose existence he is unaware shows that "willful" has less than its ordinary significance in prosecutions for violation of the [clause as to which that is the case]; and that the requirement would be satisfied by the lesser showing outlined in Peltz [433 F.2d 48 (2nd Cir.)] [a more restricted meaning than that set forth in either Murdock or Goodman]."

No. 83-1580

IN THE

Supreme Court of the United States

October Term, 1983

CASPER CITRON, STEVEN CASPER HENRY CITRON, and ALISANDE CITRON SLIVKA,

Petitioners,

against

FIONA GRAHAM CITRON, M.D.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STANLEY S. ZINNER
GREENE & ZINNER
Attorneys for Respondent
202 Mamaroneck Avenue
White Plains, New York 10601
(914) 948-4800

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Reasons for Denying the Application for a Writ of Certiorari

The instant case raises the issue of the correctness of the Circuit Court's definition of "willfully" within the context of a criminal statute. The definition employed is drawn almost entirely from this Court's prior and oft-cited ruling in *United States* v. *Murdock*, 290 U.S. 389 (1933).

The petitioners present neither a compelling nor logical argument to support their contention that this Court's ruling in the *Murdock* case is inapplicable to the federal wire-

tap statute which prohibits willful interceptions. Indeed, the Senate Report accompanying Title III of the Omnibus Crime Control and Safe Streets Act of 1968 specifically adopted the *Murdock* definition of "willfully" in defining the term within the context of the statute here in question. Under these circumstances, the ruling below is totally accurate and ought not be reviewed.

Statement of the Case

Respondent intercepted her husband's and her adult stepchildren's telephone conversations by means of a self-activating recording device which she had purchased through a *New York Times* advertisement. The first recorded interception, however, was personally activated by the wife as she overheard her husband's telephone conversation while he was using the telephone in the bathroom adjoining the marital bedroom.

The wife took the recorded conversation to her matrimonial lawyer's office and inquired about the legality of the interception. She was told not to worry about it. Consequently, she intercepted numerous other conversations using the recording device.

After several interceptions, the wife again consulted her attorney and was told that "the tapes couldn't be used in evidence but they could be used to find clues, to know where to look for clues". The taping continued.

It was only after the husband discovered the tapes and such discovery was conveyed to the wife's attorney, that

the attorney told the wife the interceptions were illegal. There were no further interceptions after that advisory.

The jury, responding to special interrogatories, specifically found that while interceptions were made the defendant's conduct was not willful.

POINT I

The Circuit Court of Appeals' Decision, Which Clarified the Meaning of "Willfully" as Used in a Criminal Statute, Was Entirely Consistent With Well-Established Principles. (Responding to Petitioners' Point I)

The thrust of the defense in this civil wiretapping action was that the conduct of the defendant wife was not "willful" and thus not culpable. That proposition, based as it was upon substantial credible evidence, was ratified by the jury verdict, the Trial Court and the Second Circuit Court of Appeals.

Petitioners mistakenly assume, however, that the Circuit Court of Appeals' decision established "ignorance of the law [a]s an excuse for conduct willfully undertaken in violation of the law" (Petitioners' brief, p. 7). In fact, the decision never mentioned the proposition, nor could any reasonable inference cull from it such a tortured reading. The Court below ruled upon the meaning of the term "willfully" when applied to fix civil liability for unlawful wiretapping, *viz.*, *Citron* v. *Citron*, 722 F. 2d 14, 15:

> We write only to clarify the meaning of "willfully" in §2511 (criminal wiretap statute) when the statute is invoked to impose civil liability under §2520.

In its careful decision, the Court below made specific reference to the definition of "willful" established by this Court in *United States* v. *Murdock*, 290 U.S. 389, 394-95 (1933) and the Congress' specific adoption of the *Murdock* definition in employing the term "willfully". By considering the text of the statute and its legislative history, the Circuit Court reasoned it did not seem logical that the same term, willfully, in the same statute, §2511, should have any different meaning when applied directly to a criminal violation than when the same violation is incorporated by reference to establish civil liability. *Citron*, 722 F. 2d at 16.

Ignorance of the law, contrary to the Petitioners' brief, was never the defense in the case. However, ignorance of the law can be considered in determining whether there exists the specific intent necessary for a violation of the law charged. *United States* v. *McIntyre*, 582 F. 2d 1221 (9th Cir. 1978). The question before the jury in this case was not whether the defendant thought her conduct was legal, but whether her state of mind was "willful".

Petitioners' belief that the Circuit Court decision establishes ignorance of the law as a defense is, simply stated, misplaced and wrong.

POINT II

There Is No Conflict of Opinion Among the Circuits Regarding the Meaning of "Willfully" as Used in the Statute. (In Opposition to Petitioners' Point II)

In support of its position, the petitioners rely upon two Circuit Court rulings which are totally inapposite to their contentions: Those cases dealt with law enforcement officials who relied principally on the good faith defense.

In *Campiti* v. *Walonis*, 611 F. 2d 387 (1st Cir. 1979), prison officials, with knowledge of the federal wiretap statute, monitored an inmate's call to a third party. These prison officials believed that their conduct was perfectly legal. In its opinion, the Circuit Court ruled that the key issue was whether the interceptions fell within the meaning of the phrases "in the ordinary course of business" or "in the ordinary course of duties" of a law enforcement officer.[1] The Court found that the monitoring was an exceptional course of conduct for the defendant prison officials and that "18 U.S.C. §2510 (5)(a)(i) does not provide the basis for a 'prison exemption' from the Act." *Campiti* at 392. The Court went on to say: "What we have here is action taken not in reliance on legislative authorization, but on a completely erroneous belief that the statute did not apply to an

1. In pertinent part, 18 U.S.C. §2510(5)(a)(i) provides:

"Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business.

extension phone or to prison officials," at 395.[2] More to the petitioners' point here, the *Campiti* Court held, "Since there was no 'court order' or 'legislative authorization' a literal reading of the statute eliminates any good faith defense". 611 F.2d at 394.

Clearly, the facts and holdings in the *Campiti* case are totally dissimilar from the case *sub judice*. The petitioners' argument that the *Campiti* case "holds that ignorance of the law is not an excuse, that the willfulness required by the statute is satisfied by the deliberate and knowing undertaking of the course of conduct regardless of ignorance of criminality, and even in the presence of a good faith belief in lawfulness" (pp. 10-11, Petitioners' brief) is a gross perversion of the decision. For brevity's sake we decline to enter the confused muddle created by petitioners' misinterpretation of *Campiti*.

Secondly, the contention at p. 11 of petitioners' brief that the Ninth Circuit in *Jacobsen* v. *Rose*, 592 F. 2d 515 (1978) held "exactly contrary" to the Second Circuit regarding punitive damages is befuddling. The Second Circuit did not rule on the quantum of proof necessary to sustain exemplary damages. Thus it could not possibly be in conflict with the Ninth Circuit's ruling on that issue. Besides, the quantum of proof necessary for punitive damages became a non-issue once the jury, by its special verdict, found respondent's actions not willful.

The Second Circuit's definition of the term "willful," as used in the applicable statutes, is clearly consistent with

2. We note that this sentence was omitted by petitioners at p. 11 of their brief when quoting from *Campiti*, although the sentence immediately precedes and clarifies the quotation.

this Court's prior rulings and the intent of the Congress. See, generally, *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976); S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. and Ad. News 2112, 2181.

POINT III

The Holding by the Second Circuit Does Not Create an Ambiguity in the Statute. (In Opposition to Petitioners' Point III)

Petitioners rely upon *Campiti* v. *Walonis*, *supra*, and *Jacobsen* v. *Rose*, *supra*, to support their contention that the Second Circuit's definition of "willful" improperly creates an additional good faith defense. Once again, petitioners' reading of the cases is erroneous.

The *Jacobsen* Court had before it a factual pattern establishing that after the issuance of a wiretap order terminating 30 days from its date, a revised order was issued which retained the original termination date. Certain of the police officer defendants never saw the revised order but believed that it terminated 30 days from its date rather than from the original termination date. The Ninth Circuit reversed as to telephone company employees on "good faith defense" grounds and remanded the issue for trial. It also reversed as to certain police officers who had relied upon their superior's direction that the wiretap was valid, on "good faith defense" grounds and remanded the issue for trial.

The *Campiti* Court's determination, revolving as it did about the good faith defense, is consistent with the *Jacobsen*

holding and both of these cases are thoroughly inapplicable to the ruling in *Citron*.

The good faith defense is available solely to law enforcement officials and those who cooperate with them. Since the respondent wife is neither, the defense is not applicable to her: Nor was it relied upon. The fact that the definition of "willful" by the Second Circuit covers much of the same ground as the "good faith defense" does not, *ipso facto*, create an additional good faith defense. The definition of the terms are consistent with each other and honors the congressional design.

Conclusion

Where, as here, a Circuit Court of Appeals defines the term "willfully" as used within the context of a criminal statute and such definition is clearly consistent with this Court's prior rulings and the legislative intent, there is no pressing reason to grant the extraordinary relief sought by way of a Writ of Certiorari.

Dated: White Plains, New York
April 17, 1984.

Respectfully submitted,

STANLEY S. ZINNER
GREENE & ZINNER
Attorneys for Respondent
202 Mamaroneck Avenue
White Plains, New York 10601
(914) 948-4800